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December 8, 2004

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; WC Docket No. 01-338

Dear Ms. Dortch:

Covad writes herewith to respond to a filing made by Qwest Communications in the above referenced dockets. By letter dated December 7, 2004, Qwest urges the Commission to adopt in this proceeding an entirely new impairment standard governing access to all UNEs under the rubric of a “market share” test.<sup>1</sup> Covad agrees with ALTS that there is an inadequate record developed to adopt Qwest’s proposed test at this late juncture in this proceeding.<sup>2</sup> Indeed, for the reasons set forth below, Covad believes that Qwest’s proposed test should be rejected on its merits. As explained below, Qwest’s proposed test runs counter to the Commission’s previous, undisturbed understanding of impairment and threatens to swallow any new impairment findings made by the Commission. Thus, Covad believes Qwest’s proposal should be rejected outright. At a minimum, however, Covad believes that the complex legal and economic issues raised by Qwest’s proposal have not been adequately developed on the record here. Thus, at a minimum, Covad echoes ALTS’ call for further notice and comment to more adequately explore the complex economic and legal issues raised by Qwest’s proposal.<sup>3</sup> Indeed, the Commission already has such an opportunity to fully address Qwest’s proposed unbundling standard in the context of a pending forbearance petition filed by Qwest, obviating any need to adopt Qwest’s proposal here.<sup>4</sup>

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<sup>1</sup> Letter from Cronan O’Connell, Vice President-Federal Regulatory, Qwest Communications, to Marlene Dortch, Secretary, FCC, WCB Docket Nos. 01-338, 04-313 (Dec. 7, 2004) (Qwest Dec. 7 Memorandum).

<sup>2</sup> See Letter from Jason Oxman, General Counsel, ALTS, to Marlene Dortch, Secretary, FCC, WCB Docket Nos. 01-338, 04-313 (Dec. 8, 2004).

<sup>3</sup> See *id.*

<sup>4</sup> Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha MSA, WCB Docket No. 04-223 (filed June 21, 2004) (Qwest Forbearance Petition). In its petition, Qwest requests relief from sections 251(c) and 271 of the Communications Act of 1934, as amended (47 U.S.C. §§ 251(c),

As an initial matter, Qwest fails to explain any need for the Commission to adopt a “self-effectuating” test of impairment based on retail market shares. By Qwest’s own admission, it has sought forbearance from the Commission to address this anomalous situation in one market in the nation: Omaha, Nebraska.<sup>5</sup> The appropriate vehicle to address any such alleged, isolated anomaly in the application of the Commission’s impairment standard is a forbearance petition or a waiver petition, not the creation of an entirely new impairment standard of general applicability.

Covad also writes here specifically to comment on one aspect of Qwest’s proposal which is not clear from its surface. Under Qwest’s proposed test, when the market share of non-ILEC facilities-based (*ie.*, those supplying their own loops) carriers exceeds 30%, this fact alone is sufficient to demonstrate non-impairment for all UNEs. Qwest also proposes that unbundling for all UNEs be removed where competitive facilities physically pass 40% of the customers (residential and business) within a given market. The irony is that Qwest’s proposed backstop impairment standard, ostensibly devised to address the alleged anomaly of one or two markets – for example, Omaha, Nebraska – will in actual operation likely remove unbundling obligations for all UNEs across the nation. As the Commission’s own statistics show, cable modem operators currently offer broadband service to approximately 60% of broadband subscribers, and currently experience growth rates of 45%.<sup>6</sup> Furthermore, according to the FCC’s data, more than 78% of zip codes have at least two providers of high-speed services, suggesting that non-ILEC facilities (e.g., coaxial cable systems) physically pass 40% of customers in many parts of the nation.<sup>7</sup> Indeed, as the Commission has previously noted, the Bells already argue that cable modem service is available to two-thirds or more of the homes in the nation.<sup>8</sup> Accordingly, Qwest’s proposed “backstop” impairment standard would likely become the exception that swallows the rule for the Commission’s actual impairment standard – removing unbundling obligations in most parts of the nation.<sup>9</sup> This absurd

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271) on the basis of its claim that it is no longer dominant in the Omaha, Nebraska MSA. In addition, Qwest asks the Commission to eliminate regulation of Qwest as a dominant carrier and as the ILEC in the Omaha MSA.

<sup>5</sup> See Qwest Dec. 7 Memorandum at 2.

<sup>6</sup> See “High-Speed Services for Internet Access: Status as of December 31, 2003,” Industry Analysis and Technology Division, Wireline Competition Bureau, June 2004, at Table 1. See also “Federal Communications Commission Releases Data On High-Speed Services For Internet Access,” News Release, June 8, 2004, at 2 (available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/hspd0604.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0604.pdf)).

<sup>7</sup> See *id.* at Table 7.

<sup>8</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98 and 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, at para. 229 and n. 692 (*Triennial Review Order*).

<sup>9</sup> Given that Qwest’s proposal leaves ILECs the sole ability to define relevant geographic markets for the application of its proposed “backstop” test, it leaves the door wide open for them to gerrymander the

outcome demonstrates that Qwest's proposed "backstop" has less to do with solving any anomalies in Omaha (or Terry, Montana for that matter) than it has to do with erecting a backdoor means of escaping all unbundling obligations nationwide.

Furthermore, while Qwest's proposed standard purports to base itself on the presence of actual retail competition, in fact its second prong – based on the availability of competitor intermodal facilities – does nothing of the sort. In fact, Qwest's proposal leaves wide open the possibility that wireless or satellite intermodal alternatives to the ILEC network could be used to satisfy Qwest's proposed test, despite continued ILEC dominance in the retail markets for services provided over these platforms. For example, the Commission's latest data show that satellite and wireless together account for less than 2% of total high-speed lines in service.<sup>10</sup> Under Qwest's proposal, however, the relatively miniscule market share enjoyed by these intermodal broadband platforms would not matter. Rather, the mere availability of these intermodal broadband platforms within a geographic market – as defined by the ILEC – would be sufficient to remove unbundling obligations for all UNEs in that geographic market.

Notably, Qwest's proposed standard is difficult to reconcile with the Commission's own previous statements refraining from relying on the presence of a single intermodal competitor to remove unbundling. In the *Triennial Review Order*, the Commission rejected exactly the sort of approach suggested by Qwest here, finding it inconsistent with the statute's requirement in section 251(d)(2) that the Commission analyze "whether requesting carriers are 'impaired,' not whether certain thresholds of retail competition have been met."<sup>11</sup> (Notably, if the Commission were to adopt Qwest's proposal here, in any subsequent litigation, the Commission would be hard-pressed to explain its sudden about-face from this previous interpretation of the statute left undisturbed by reviewing courts.) For example, the Commission expressly declined to rely solely on the presence of cable modem competition in phasing-out the line sharing UNE, relying instead on its analysis of competitor abilities to obtain revenues from non-data services over copper loops.<sup>12</sup> By contrast, Qwest's proposed impairment standard would upend this analysis and, in addition to removing unbundling for all other UNEs, prejudice the pending proceeding before the Commission to reinstate the line sharing UNE.<sup>13</sup>

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application of this test to wherever any intermodal competitor's facility is located. See Qwest Dec. 7 Memorandum at 3.

<sup>10</sup> See *High-Speed Services for Internet Access: Status as of December 31, 2003*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 1 (June 2004).

<sup>11</sup> See *Triennial Review Order* at para. 114.

<sup>12</sup> See *id.* at para. 263 ("...cable modem's lead in broadband deployment is not dispositive in our impairment analysis.")

<sup>13</sup> See *Petition for Reconsideration of Earthlink*, CC Docket No. 01-338 (filed October 2, 2003).

Furthermore, as both the Department of Justice and the FCC have long recognized, duopoly conditions are insufficient to produce competitive outcomes. Duopoly competition is problematic not only because the firm with the larger market share may exercise market power, but also because *both* participants are likely to have the incentive and ability to maintain prices above competitive levels rather than attempting to ruthlessly compete with each other, as they would need to do in a market with multiple firms.<sup>14</sup> Accordingly, as the FCC has concluded, “both economic theory and empirical studies” indicate that “five or more relatively equally sized firms” are necessary to achieve a “level of market performance comparable to a fragmented, structurally competitive market.”<sup>15</sup> Thus, Qwest’s proposed impairment standard would fly in the face of the Commission’s own previous determinations regarding the level of competition sufficient to produce competitive outcomes, creating significant new litigation risks for the Commission.

Accordingly, Covad urges the Commission to reject Qwest’s attempt at this late hour to introduce an entirely new impairment standard based on retail market shares. As explained above, such a standard can easily be rejected on its merits, given the threat it poses to swallow the entirety of the Commission’s impairment standard. Furthermore, at a very minimum, Qwest’s proposal raises issues of sufficient significance and complexity to warrant additional development in the record – such as, for example, will take place over the course of Qwest’s pending forbearance petition.

Respectfully submitted,

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/s/

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<sup>14</sup> See United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Section 2 (rev. Apr. 8, 1997).

<sup>15</sup> Report and Order, *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, ¶ 289 (2003).